

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 92-61

In re Applications of

LRB BROADCASTING File No. BPH-901218MI  
(hereafter "LRB")

DAVID WOLFE File No. BPH-901219MI  
(hereafter "Wolfe")

ZENITRAM File No. BPH-901220MG  
COMMUNICATIONS, INC.  
(hereafter "Zenitram")

PHILIP Y. HAHN File No. BPH-901220MK  
(hereafter "Hahn") (DISMISSED HEREIN)

For Construction Permit  
for a New FM Station on Channel 288A  
in Brockport, New York

## HEARING DESIGNATION ORDER

Adopted: March 23, 1992; Released: April 13, 1992

By Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* An engineering review of the Hahn application reveals that the Hahn proposal does not comply with the provisions of the *Working Arrangement For Allotment And Assignment Of FM Broadcasting Channels 201-300 Under The Canadian-U.S.A. FM Broadcasting Agreement of 1947* ("Canadian Agreement"), and therefore must be dismissed as having been inadvertently accepted for filing.

3. The Brockport allocation in this proceeding is a Class A allotment both domestically and internationally. The Canadian Agreement, *inter alia*, imposes strict limitations on the power and height of domestic FM stations situated within 320 kilometers of the Canadian border. An engineering review of the Hahn application indicates that the proposed effective radiated power (ERP) of 3.6 kilowatts (kW) exceeds the applicable limitation of 3 kW ERP. See *Canadian Agreement* at Section 2.2.

4. The Commission's rules for FM radio stations place the responsibility for compliance with the Canadian Agreement squarely on the applicant, not on the Commission's processing line. Applications that fail to comply with international broadcasting agreements are unacceptable for filing and are thus summarily dismissed. See *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990); cf. *Kerrville Radio*, 2 FCC Rcd 3441, 3442 para. 8 (1987) (Commission's rules for FM radio stations place

responsibility for compliance with U.S.-Mexican Agreement squarely on the applicant); *1010 Broadcasting, Inc.*, 59 RR 2d 1124, 1125-26 paras. 7-9 (1986) (same).

5. Consistent with the "hard look" procedures for new FM applications adopted in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), it was Hahn's responsibility to review his application to ensure its acceptability. *A.D. Broadcasting Corporation*, 4 FCC Rcd 4772 (1989), *appeal dismissed*, No. 89-1413 (D.C. Cir. Feb. 27, 1990). The "hard look" procedures state that effective radiated power is evaluated in the course of an acceptability study and that this parameter may be affected by international agreements. Moreover, the instructions to FCC Form 301 admonish applicants to familiarize themselves with the Commission's rules, which make specific reference to the Canadian Agreement. Cf. *Kerrville*, 2 FCC Rcd at 3442. *Kerrville* and other precedents make clear that applicants are on notice that the provisions of international agreements may affect the acceptability of their applications. See *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991). Accordingly, the Hahn application will be dismissed as inadvertently accepted for filing. See *Pike Family Broadcasting, Inc.*, 6 FCC Rcd 5552 (1991); *Quinto Broadcasting Corp.*, 6 FCC Rcd 5550 (1991).

6. *Environmental.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled "Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that Wolfe and Zenitram did not address the matter of how they would protect workers on their respective towers from RF radiation exposure. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Wolfe and Zenitram may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since Wolfe and Zenitram failed to indicate how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, the applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally OST Bulletin No. 65, *supra*, at 28. Accordingly, Wolfe and Zenitram will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its

analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. See 47 C.F.R. § 1.1308(d).

7. *LRB*. LRB has not supplied the name of a contact person at the financial institution listed in its application as a funding source. We shall require that it supply the missing information to the presiding Administrative Law Judge.

8. *Comparative Coverage*. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. *Conclusion*. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications (save Hahn's) ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Wolfe or Zenitram in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1.1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED. That the Hahn application IS HEREBY DISMISSED.

12. IT IS FURTHER ORDERED. That in accordance with paragraph 6 hereinabove, Wolfe and Zenitram shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

13. IT IS FURTHER ORDERED. That within 30 days of the release of this Order, LRB shall file the amendment specified in paragraph 7 above and serve a copy of it upon the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED. That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hear-

ing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED. That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. See generally *Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

16. IT IS FURTHER ORDERED. That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

#### FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief  
Audio Services Division  
Mass Media Bureau